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ALEXANDER L. STEVAS,
CLERK

No. 84-836

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 21,
1984, CERTIORARI GRANTED MARCH 4, 1985

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KINGS

People v. Booker T. Hillery
Crim. No. 3922

Docket No.	Docket Entry
CT 1 [1]	The Grand Jury of Kings County returned an indictment on June 27, 1962, charging respondent Booker T. Hillery with a violation of California Penal Code section 187 in that on or about the 21st of March, 1962, respondent did willfully,

1. Hereafter "CT" refers to the Clerk's Transcript prepared in connection with the appeal of respondent's first state court trial; "RT" refers to the Reporter's Transcript prepared in connection with the appeal of respondent's first state court trial; "CR" refers to the Clerk's Record for the Ninth Circuit appeal in this case.

Docket No.	Docket Entry
	unlawfully, and feloniously murder Marlene Miller.
CT 11-29	On July 16, 1962, respondent, through his attorney, made a motion to quash the indictment. The motion alleged that members of respondent's race had been systematically and purposely excluded from the Grand Jury which indicted him.
CT 41	Respondent's motion was heard, considered, and denied on July 31, 1962.
CT 75	On November 16, 1962, the jury returned a verdict of guilty as to the charged offense and fixed the degree at first degree murder.
CT 132	On November 20, 1962, the jury returned a verdict fixing respondent's penalty at death.

Docket No.	Docket Entry
CT 145	On November 26, 1962, the court imposed a judgment of death.
CT 145	An automatic appeal to the California Supreme Court followed pursuant to section 1239(b) of the Penal Code.

SUPREME COURT OF THE STATE OF CALIFORNIA

People v. Booker T. Hillery
Crim. No. 7320

CR 1	On May 3, 1965, the California Supreme Court filed an opinion affirming the guilt phase of respondent's trial but reversed imposition of the death penalty. (People v. Hillery (1965) 62 Cal.2d 692.)
CR 1	Respondent was to be subsequently given two additional

Docket No.	Docket Entry
	penalty trials with each resulting in imposition of a death sentence. (See People v. Hillery (1967) 62 Cal.2d 795, cert. en., 87 S.Ct. 958 (1967); In re Hillery (1969) 71 Cal.2d 857.) Finally, respondent's third death sentence was reduced to life imprisonment as a result of the California Supreme Court's decision in People v. Anderson (1972) 6 Cal.3d 628. (See People v. Hillery (1974) 10 Cal.3d 897.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

HC No. 87642

CR 1	11/30/78	Petition for writ of habeas corpus denied.

Docket No. Docket Entry

COURT OF APPEAL OF THE STATE

OF CALIFORNIA, FIRST APPELLATE DISTRICT

In re Booker T. Hillery
1 Crim. 17891

CR 1 3/8/78 Petition for writ of habeas corpus denied.

SUPREME COURT OF THE STATE OF CALIFORNIA

In re Booker T. Hillery
Crim. No. 20424

CR 1 4/18/78 Petition for writ of habeas corpus denied.

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

Booker T. Hillery v. George Sumner, Warden
Civil No. S-78-594 TJM

CR 1 5/22/78 Respondent filed a habeas corpus petition in

Docket No.		Docket Entry
		the United States District Court for the Northern District of California on May 22, 1978. It was later transferred to the Eastern District.
CR 2	1/31/79	On January 31, 1979, the District Court, per Judge MacBride, issued an order to show cause. The court's order granted respondent permission to proceed in forma pauperis.
CR 4	3/22/79	Petitioner's Return to the order to show cause was filed on March 22, 1979 and
CR 5	4/23/79	on April 23, 1979, respondent filed his traverse.
CR 16	6/19/80	In response to a motion
CR 20	7/11/80	filed by petitioner on

Docket No.		Docket Entry
		June 19, 1980 and an opposition filed by respondent on July 11, 1980, the District
CR 21	8/7/80	Court on August 7, 1980 issued a published order denying petitioner's various dispositive motions. (Hillery v. Sumner (E.D. Cal. 1980) 496 F.Supp. 632.)
CR 31	9/29/81	In an order dated September 29, 1981, which followed a status conference, the District Court directed respondent to prepare a proposed stipulation which was to have attached to it all of the documents which supported respondent's claim of systematic exclusion. The

Docket No.		Docket Entry
		stipulation was to include those matters which petitioner agreed could be submitted to the District Court on documents alone (CR 31).
CR 32	10/14/81	The stipulation was filed on or about October 14, 1981.
CR 34	10/30/81	On October 30, 1981, petitioner filed a document entitled response to the District Court's order of September 29, 1981, along with a notice of motion and motion to dismiss the petition.
CR 36	11/10/81	On November 10, 1981, petitioner filed a notice of motions and motions for dismissal of petition for

Docket No.		Docket Entry
		failure to exhaust as to the newly discovered and recently produced evidence and for summary denial of the petition.
CR 39	3/9/82	On March 9, 1982, the District Court filed a published opinion denying the state's motion. The court held, inter alia, that respondent's allegations were sufficient to support a prima facie case and to preclude the summary dismissal of the petition. (Hillery v. Pulley (E.D. Cal. 1982) 533 F.Supp. 1189.)
CR 56	5/12/83	On May 12, 1983, the District Court issued its published 54-page opinion

Docket No.	Docket Entry
	granting the petition for a writ of habeas corpus. (Hillery v. Pulley (E.D. Cal. 1983) 563 F.Supp. 1228.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Booker T. Hillery v. R. Pulley, Warden
No. CA 83-2017

5/14/84	The published majority and dissenting opinions of the Ninth Circuit Court of Appeal affirming an order of the United States District Court for the Eastern District of California were filed on Mar 14, 1984.
9/12/84	A timely petition for rehearing and a suggestion

Docket No.	Docket Entry
	for rehearing en banc was thereafter filed in the Ninth Circuit Court of Appeal. That court filed an order denying rehearing on September 12, 1984.

SUPREME COURT OF THE UNITED STATES

D. Vasquez, Warden v. Booker T. Hillery
No. 84-836

11/21/84	Petition for writ of certiorari to United States Court of Appeals for the Ninth Circuit filed in Supreme Court of United States by D. Vasquez, Warden (No. 84-836).
3/4/85	Petition for D. Vasquez, Warden, granted by Supreme

Docket No.	Docket Entry
	Court of United States
	(No. 84-836).

EXCERPT FROM THE MOTION TO DISMISS THE PETITION FOR A WRIT OF HABEAS CORPUS FILED IN THE DISTRICT COURT ON OCTOBER 30, 1981

(Docket Entry CR 36)

THE STATE COURT RECORD

1. Trial Court Record

A. Clerk's Transcript

(1) pp. 11-13 Motion to quash dated July 16, 1962.

(2) pp. 26-27 Motion to quash the indictment.

(3) pp. 28-29 Declaration of Booker T. Hillery in support of motion to quash the indictment dated July 23, 1962.

(4) pp. 30-31 Declaration of Charles Leach in opposition to motion to quash.

(5) pp. 32-38 Declaration of Vernice Thomsen in opposition to motion to quash.

(6) pp. 39-40 Declaration of Alice Hanna [1/] in opposition to motion to quash.

B. (1) Reporter's Transcript, session of July 16, 1962, pp. 6-14.

(2) Reporter's Transcript, session of July 31, 1962, pp. 15-126.

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1. In her declaration, Alice Hanna used the United States Census reports to compile the following table population figures:

Year	Total Population	Black Population	Black % of Total Population
1910	16,200	172	1.0
1920	22,028	180	0.8
1930	21,894	247	1.1
1940	35,159	324	0.9
1950	45,800	1,819	3.97
1960	49,944	2,578	5.1

2. Appellate Court Record

(1) Appellant's opening brief

(2) Respondent's brief

(3) Appellant's closing brief

(4) The decision of the California Supreme Court which is reported as People v. Hillery (1965) 62 Cal.2d 692.

EXCERPT FROM STATE COURT CLERK'S TRANSCRIPT RELATING TO THE MOTION TO QUASH FILED BY RESPONDENT BOOKER T. HILLERY IN HIS ORIGINAL MURDER TRIAL

(Docket Entry CT 11-29)

(Title of Court and Cause)

MOTION TO QUASH INDICTMENT; MOTION TO SET ASIDE INDICTMENT (P.C. 995); MOTION TO PRODUCE PHOTOCOPIES, MAPS AND ALL PHYSICAL EVIDENCE; MOTION FOR EXAMINATION OF WITNESSES

The defendant, Booker T. Hillery, Jr., hereby moves the court as follows:

I. To quash the indictment herein on the following grounds:

1. That indictment by grand jury violates the following amendments to the United States Constitution:

(a) Due Process clause of the 14th Amendment;

(b) Equal Protection clause of the 14th Amendment.

2. That the grand jury proceedings, as apply to

this particular case, violate the Due Process and Equal Protection Clauses of the 14th Amendment of the United States Constitution.

3. That Negroes have been, and are, systematically excluded from service on grand juries in Kings County, California, and that the grand jury which brought in the indictment was a grand jury on which Negroes were systematically excluded, and this in violation

of the Due Process and Equal Protection clauses of the 14th Amendment of the Constitution of the United States.

4. Bias, prejudice and partiality on the part of some members of the grand jury which indicated the defendant in violation of the Penal Code governing grand jury proceedings.
5. Presence of unauthorized persons during grand jury sessions in violation of Penal Code sections governing grand jury proceedings.
6. Prejudicial misconduct on the part of District Attorney Charles F. Leach,

and Assistant Attorney Ralston Courtney during the grand jury proceedings that led to the indictment herein.

7. The advising of a witness by investigating officers against giving testimony in favor of the defendant at the grand jury proceedings that led to the indictment herein.

II. Motion to set aside the indictment (P.C. Sec. 995, subdivision 1) upon the ground that the defendant has been indicted without reasonable or probable cause.

III. Motion for Production of Evidence

The defendant hereby moves for an order of this court to

permit the defendant, and his counsel, together with such other persons as the defendant may deem proper, to examine all exhibits introduced at the grand jury proceedings which led to the indictment herein, and for copies of all statements and documents and exhibits of all kinds in the possession of any law enforcement agency, or in possession of the district attorney, or in the possession of any officer connection with the investigation on behalf of the People of the State of California.

IV. That the defendant be permitted to examine certain witnesses under oath, in order that their testimony may be available at the time of trial, if any, because of the possibility that said witnesses will not be available, because of death, because of the transitory nature of their employment, and such other reasons as are set forth in the affidavits to be filed herewith.

Said motions will be made on the records, proceedings, and files in this action, and upon affidavits or declarations under penalty of perjury, and upon testimony

that may be elicited at the time the motions are heard, and such other matters as counsel deems pertinent thereto.

Date: July 16, 1962 Respectfully submitted,

/s/Hugh Wesley Goodwin

Receipt is hereby acknowledged of the hereinafter Motion, and Declaration in Support of said motion, and Points & Authorities.

/s/ ANITA L. CHANDLER
District Attorney,
Kings County

(Title of Court and Cause)

MOTION TO QUASH AND SET ASIDE INDICTMENT

To the People of the State of California, plaintiff, and the Charles F. Leach, District Attorney, Kings County:

You will please take notice that on Tuesday, the 31st day of July, 1962, at 10 o'clock A.M. of said day, at the courtroom of the above-entitled court at the courthouse in the city of Hanford, County of Kings, State of California, the above-named defendant will move the court for an order

quashing and setting aside the indictment filed herein. Said motion will be made upon the grounds that the indictment herein resulted from procedures which violated the defendant's rights as guaranteed by the 14th Amendment of the Constitution of the United States, and upon the further ground that the defendant had been indicted without reasonable and probable cause in violation of Section 995 of the California Penal Code.

Said motion will be based upon this notice; upon the declaration under penalty of perjury of Booker T. Hillery, Jr., attached hereto, and upon testimony to be adduced at the time of hearing, and upon the proceedings, records, and files herein.

/s/ HUGH WESLEY GOODWIN
Attorney for defendant

(Title of Court and Cause)

DECLARATION IN SUPPORT OF MOTION TO QUASH AND SET ASIDE INDICTMENT

BOOKER T. HILLERY, JR., hereby declares: That he is the defendant in the above-entitled action; that he has filed a motion to quash the indictment herein because his rights under the 14th Amendment of the Federal Constitution have been violated in that, among other things, the grand jury that indicted him, and the previous grand juries from which members of his race have been systematically excluded. The declarant is a member of the Negro race; that his information is that the County of Kings has been organized as a political subdivision of the State of California since at least 1893. That since the said 1893 no Negroes have ever

served on a grand jury panel in the said County of Kings. Not only is it true that no Negro has served on any grand jury in the County of Kings but it is further declarant's information that no Negro's name has been submitted among those from whom the various grand jury panels have been selected. That the reason for this exclusion has been because of the race or color of the Negro people. That this information was not available to declarant until after this indictment was filed against him. That it is declarant's information that the Negro population in Kings County is now between

8 to 15 percent of the total population, and this percentage has been true, declarant believes, all during said period except he is very certain that it has been true during and since World War II that among the Negroes that constitute the 8 to 15 percent of the residents of Kings County, there are many Negroes because of educational and other qualifications who would be and would have been eligible to serve on the grand jury had their names been submitted and has not members of their race been systematically excluded from the said grand jury panels.

I declare under penalty of perjury that the foregoing statement is true and correct.

Executed at Hanford, California,

July 23, 1962.

/s/BOOKER T. HILLERY, JR.

POINTS & AUTHORITIES:

14th Amendment, U. S. Constitution
Reece vs. State of Georgia, 350 U.S. 76
Patton vs. State of Mississippi, 332 U.S. 463
Norris vs. State of Alabama, 274 U.S. 367
Carter vs. State of Texas, 177 U.S. 442
Smith vs. State of Texas, 311 U.S. 128
Hernandez vs. State of Texas, 347 U.S. 475
Penal Code, Sec. 995

(ENDORSED)

FILED JULY 23, 1962
VERNICE THOMSEN, CLERK
BY _____ DEPUTY

(Title of Court and Cause)

DECLARATION OF CHARLES F. LEACH
IN OPPOSITION TO THE MOTION TO
SET ASIDE INDICTMENT

Charles F. Leach hereby makes the following declaration:

(1) That I am the District Attorney of the County of Kings, State of California, and have held that office since January, 1957; that I was a deputy in such office from November 17, 1952 to October, 1954.

(2) That the records in the County Clerk's office show that there were in excess of 1,000 criminal prosecutions initiated by information in the Superior Court of the State of California, in and for the County of Kings between the period of January 1, 1952 to January 1, 1962.

(3) That during the same period, viz: January 1, 1952 to January 1, 1962, there were only four felony prosecutions initiated by grand jury indictment. That only one of this number was a member of the Negro race, namely Sherman Dillard; that during the current year there has been one indictment, namely, Booker T. Hillery, Jr.

(4) That it is customary for the grand jury in Kings County to devote practically all of its time to the investigation of County departments, institutions and officers, hospital districts, school districts and special districts, and that rarely is any of the grand jury's time devoted to hearing evidence of criminal offenses.

(5) That I have observed from the vantage point of my office the selection of trial and grand juries for the past ten years; that no class of persons has been systematically excluded from such juries because of race, creed or wealth.

I make this declaration under penalty of perjury at Hanford, in the County of Kings, State of California, this 31st day of July, 1962.

/s/ CHARLES F. LEACH
CHARLES F. LEACH
District Attorney

(ENDORSED)

FILED JULY 31, 1962
VERNICE THOMSEN, CLERK
BY _____ DEPUTY

(Title of Court and Cause)

DECLARATION OF VERNICE
THOMSEN IN OPPOSITION TO
MOTION TO SET ASIDE INDICTMENT

Vernice Thomsen makes the following declaration:

(1) I am the County Clerk of the County of Kings, State of California. I have held such office since 1953. Prior to that time I was a deputy to the County Clerk of the County of Kings, which occupation I commenced in the year 1939.

As a part of my function as County Clerk I am also ex-officio Clerk of the Superior Court and ex-officio Clerk of the Board of Supervisors.

(2) I participate in the selection of Trial Jurors in the following manner:

(a) In January of each year, the Judge of the Superior Court delivers to

me an order designating the number of grand and trial jurors that he estimates will be needed during the ensuing year.

(b) Upon receipt of this order I make reference to the current County Register of Voters and determine the identities of all registered voters thereon who are disqualified by virtue of prior trial or grand jury service.

(c) I then prepare a list of registered voters in each Supervisorial District who are not disqualified by virtue of prior trial or grand jury service. These lists are given the respective Supervisors. I also inform each Supervisor of the total number of jurors that the Court has estimated will be required for jury service during the next succeeding twelve months. I also inform

each of them of the specified statutory qualifications for jurors and of the statutory exemptions.

(d) Thereafter, and within approximately sixty days, each of the Supervisors provides me with a list of registered voters within his Supervisorial District whom he has selected as prospective trial jurors. Usually, the lists combined exceed the number of trial jurors ordered selected by the Superior Court Judge.

(e) I then check the names submitted by the Supervisors against the Voter's Registration Affidavit to determine current address and occupation. I check the occupation only to the extent necessary to determine whether the person is exempt from

jury service. All persons exempt by statute are elminated from the lists.

(f) My next procedure is to select alternately from each Supervisor's list an amount equivalent to one-fifth of the total number of jurors ordered to be selected by the Superior Court Judge. This compilation is by chance. When this list is completed it is submitted to the Board of Supervisors for their approval.

(g) Each of the prospective jurors named on the list as finally approved by the Board of Supervisors is mailed a questionnaire and covering letter, a copy of which

is attached hereto, marked Exhibit "A," and incorporated herein by reference. At no time is there any designation on any of the aforesaid lists by which the prospective juror's race, color or creed can be determined. I have never made any distinction between men or women in the preparation of lists of prospective jurors or has any distinction been made upon the basis of wealth, poverty, race, or creed.

(h) I know it to be a fact that since I have taken office as County Clerk of Kings County, members of the Negro race have been selected to act as trial jurors.

(3) I participate in the selection of grand jurors in the following manner:

(a) As a part of the same order pursuant to which trial jurors are selected, there is contained an order specifying the number of grand jurors to be summoned from which a panel of grand jurors is to be drawn for the ensuing year.

(b) In regard to the selection of grand jurors, the Superior Court Judge provides me with a list of approximately thirty-five to forty names along with a request that I determine from the Register of Voters the correct address of each person so listed, and also whether any person whose name appears upon said list is exempt because of occupation. I also determine from the trial jury records and grand jury records whether any of the persons whose names appear

on the Judge's list are disqualified because of prior jury service.

(c) The prospective grand jury list is then returned to the Judge of the Superior Court who, in due course, provides me with a final list.

(d) I have never been requested by any Superior Court Judge during my term as County Clerk to provide him with information relative to the race, creed, wealth, or poverty of any prospective grand juror.

I make this declaration under penalty of perjury at Hanford, in the County of Kings, State of California, this 31st day of July, 1962.

/s/ VERNICE THOMSEN
VERNICE THOMSEN

DECLARATION OF ALICE
HANNA IN OPPOSITION TO
MOTION TO SET ASIDE INDICTMENT

Alice Hanna hereby makes the following declaration:

(1) I am the County Librarian for the County of Kings, State of California. I have had that occupation and position for seven years last past.

(2) That at the request of Charles F. Leach, District Attorney of the County of Kings, and from information within my custody and control and available to me in my capacity as County Librarian, I compiled the following statistics:

(a) In the year 1910 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 16,200; 172 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 1.0% of the total population.

(b) In the year 1920 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 22,028; 180 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 0.8% of the total population.

(c) In the year 1930 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 21,894; 247 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 1.1% of the total population.

(d) In the year 1940 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 35,159; 324 of said inhabitants were reported as being members of the Negro race; statistically, the

reported Negro population was 0.9% of the total population.

(e) In the year 1950 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 45,800; 1819 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 3.9% of the total population.

(f) In the year 1960 the total population of the County of Kings, as recorded by the United States Bureau of Census, was 49,944; 2,578 of said inhabitants were reported as being members of the Negro race; statistically, the reported Negro population was 5.1% of the total population.

I make this declaration under penalty of perjury at Hanford, in the County of Kings, State of California, this 30th day of July, 1962.

/s/ ALICE HANNA
ALICE HANNA

Year	Total Population	Black Population	Black % of Total Population
1910	16,200	172	1.0
1920	22,028	180	0.8
1930	21,894	247	1.1
1940	35,159	324	0.9
1950	45,800	1,819	3.97
1960	49,944	2,578	5.1

EXCERPT FROM THE OPINION OF THE CALIFORNIA SUPREME COURT AFFIRMING THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH THE INDICTMENT

(People v. Hillery
(1965) 62 Cal.2d 692)

Defendant points out that he is a Negro and contends that the court erred in denying his motion to quash the indictment on the ground that members of his race were systematically and purposefully excluded from the grand jury which indicted him. But a factual basis for this objection was not established. Defendant relies on such decisions as Patton v. Mississippi (1947) 332 U.S. 463 (see also cases cited at p. 465, fn. 3, of 332 U.S.). As the latter opinion makes clear, however, "whether there has been systematic racial discrimination by administrative officals in the selection of jurors is a question to be determined from the facts in each particular case." (Id., at p. 466.)

Here the record shows that affidavits in support of and in opposition to defendant's motions were filed, and a hearing was held at which evidence was taken.

Defendant sought to prove that no Negro had served on a Kings County grand jury since 1893, the year in which the county was organized. The People did not dispute this fact, but introduced evidence based on official census records establishing that in 1960 Negroes constituted only 5.1 percent of the total population of Kings County, and that prior to World War II the proportion had been one percent or less. It was also shown that Negroes had often served on petit juries in Kings County (and defendant does not complain of the fact that there was no Negro on the jury that tried and convicted him). The county clerk certified that it was her duty to check the proposed grand jury list against the voters' registration affidavits to determine whether any persons therein named were disqualified by statute, but that such affidavits bear no indication as to the race of the voter; she further testified that

during her tenure in office (since 1953) no member of the board of supervisors or judge of the superior court had ever requested her to determine the race of a prospective grand juror.

In the course of the hearing on the motion to quash the trial judge spoke at length on the subject of his method of selecting grand juries since he took office in 1956, and subsequently ordered that such statements be considered as his testimony. He said that in selecting a panel he "always endeavors on each one of those [judicial] districts to get a good cross section of people who will be qualified to serve as Grand Jurors"; that he had consistently "tried to get a distribution of racial descents, tried to get both sexes represented, tried to get occupations, farmer, business men and various other types so it will be real -- a real representative

group of people, of the better type"; and that since 1956 he had not had a Negro on the panel "not through lack of desire, but purely through lack of ability to find one that the Court feels would make a proper Grand Juror." The judge pointed out that he had practically asked defendant's counsel to suggest the names of Negro residents who might be qualified to serve, and had considered selecting a Mr. Lloyd Welcher but declined to do so after determining that the duties would interfere with the latter's regular employment. Finally, it was shown that in Kings County "rarely is any of the grand jury's time devoted to hearing evidence of criminal offense," and that in the decade ending in 1962 more than 1,000 prosecutions were initiated by information while four were initiated by indictment and only one of the latter was against a Negro.

The foregoing record amply supports the trial court's determination that there was no systematic exclusion of Negroes from the grand jury which indicted defendant. In this respect the case at bench is indistinguishable from and is controlled by our decision in People v. Burwell (1955) 44 Cal.2d 16, 41-42 [36], cert. denied, 349 U.S. 936.

defendant's remaining contentions -- that in several respects the grand jury proceedings were not conducted in accordance with law -- have been examined and are so devoid of merit as to require no particular discussion.

By supplemental brief prepared in propria persona defendant contends that evidence was introduced against him which had been illegally seized from his automobile and his hotel room. No objection was interposed on this ground.

EXCERPT FROM THE MOTION FILED BY THE STATE OF CALIFORNIA IN THE UNITED STATES DISTRICT COURT RELATING TO THE EXPANDED RECORD BEFORE THE DISTRICT COURT IN THE HABEAS CORPUS PROCEEDINGS

(Docket Entry CR 36)

PETITIONER'S VERSION OF THE EXPANDED RECORD

Petitioner was directed to attach all of the evidence he has in support of his claim regarding the systematice exclusion of blacks from the Kings County grand jury to the stipulation he filed in October of 1981. The foregoing is a list of the material which is not a part of the state court record which is attached to the stipulation:

1. Declaration of Oliver F. Folsom dated June 16, 1980.

2. Declaration of Evvie Edwards dated June 11, 1980.

3. Declaration of Joshua Richardson dated June 9, 1980.

4. U.S. Census Bureau records for the years: 2/

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2. Petitioner has not limited his use of the census data to that of Alice Hanna. Petitioner has expanded the use of census data and is now using census data to establish the population of persons eligible to serve on the grand jury. In addition, petitioner had introduced census figures for 1900 which were not introduced or used in his motion to quash.

(a) 1900

(b) 1910

(c) 1920

(d) 1930

(e) 1940

(f) 1950

(g) 1960

5. Bene-tech report prepared by Donald Parkyn.

THE COMPUTER REPORT PREPARED BY CONSULTING ACTUARY DONALD PARKYN WHICH WAS FILED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

(Docket Entry CR 36)

DONALD W. PARKYN, INC.
Consulting Actuaries
Post Office Box 1196
Sacramento, California 95806

916-481-7825

August 31, 1981

Clifford Tedmon
Tedmon & Tedmon
2717 Cottage Way, #20
Sacramento, California 95825

Dear Mr. Tedmon:

You asked me to calculate the probability that a jury of nineteen non-blacks could be selected each year from 1900 through 1962 in Kings County California.

Table 1 provides a summary of the data from U.S. census reports. The data for 1920 and prior are based upon males only as females were not eligible to vote and therefore, according to my best information, were not eligible for jury duty. The data is for persons age 21 and over.

Table 1

Basic Information From U.S. Census Reports

Year	Total Population Males	Females	Total	Non-White Population Males [A]	[B]	Females [A]	[B]	Eligible Total	Black
1900	3,446			27				3,446	27
1910	5,765			53+558= 611				5,765	53
1920	7,547	5,519	13,066	59+629= 688		49+176= 225		13,066	108
1930	8,098	6,430	14,528	93+484= 577		76+184= 260		14,528	169
1940	11,328	9,773	21,101	130+319= 449		100+164= 264		21,101	230
1950	13,807	13,084	26,891		801		638	26,891	
1960	13,949	13,728	27,677		907		749	27,677	
1970	18,458	17,620	36,078	799+611=1410		740+689=1429		36,078	1539

[A] = Black
[B] = Other non-White

For the 1950 and 1960 census a breakdown of black males and black females age 21 and over was not available. These values were estimated from a known breakdown of black males and black females at all ages as shown in Table 2.

Table 2

Estimated Split of Non-Whites
between Black and Other Non-Whites

Year 1950:

	Male	Female	Total
Black	958	861	
Other	346	278	
Total	1,304	1,139	
Over 21 Black	801 [588]	638 [482]	[1,070]

Year 1960:

	Male	Female	Total
Black	1,385	1,193	
Other	359	318	
Total	1,744	1,511	
Over 21 Black	907 [702]	749 [591]	[1,311]

[__] indicates data was estimated.

Table 3 combines information from Tables 1 and 2 and provides the basic information used in my analysis.

Table 3

Information Combines from Table 1 and Table 2

Year	Total Population Males	Females	Total	Non-White Population Males [A]	[B]	Females [A]	[B]	Eligible Total	Black
1900	3,446			27				3,446	27
1910	5,765			53+558= 611				5,765	53
1920	7,547	5,519	13,066	59+629= 688		49+176= 225		13,066	108
1930	8,098	6,430	14,528	93+484= 577		76+184= 260		14,528	169
1940	11,328	9,773	21,101	130+319= 449		100+164= 264		21,101	230
1950	13,807	13,084	26,891	[588]	801	[482]	638	26,891	1070
1960	13,949	13,728	27,677	[720]	907	[591]	749	27,677	1311
1970	18,458	17,620	36,078	799+611=1410		740+689=1429		36,078	1539

[A] = Black
[B] = Other non-White

Table 4 shows the percentage of blacks in Kings county for each census. This table is derived from Table 3.

Table 4

Percentage Black

Year	Blacks/Total	%-Black
1900	27/ 3,446	.7835
1910	53/ 5,765	.9193
1920	108/13,066	.8266
1930	169/14,528	1.1633
1940	230/21,101	1.0900
1950	1,070/26,891	3.9790
1960	1,311/27,677	4.7368
1970	1,539/36,078	4.2658

Table 5 is an estimate of the percentage of blacks age 21 and over in Kings County for each year 1900 thru 1962. The values in Table 5 are the result of a graduation of the decennial values shown in Table 4. The percentages are deliberately understated at most ages. This understatement has the effect of increasing the probability that an all non-black jury can be formed.

Table 5

Percentage Black
Estimated by Year

Year	%-Black	Year	%-Black
1900-1940	.8000	1952	4.0000
1941	1.1100	1953	4.1000
1942	1.4200	1954	4.2000
1943	1.7300	1955	4.3000
1944	2.0400	1956	4.3900
1945	2.3500	1957	4.4800
1946	2.6600	1958	4.5700
1947	2.9700	1959	4.6500
1948	3.1800	1960	4.7300
1949	3.4900	1961	4.7300
1950	3.8000	1962	4.7300
1951	3.9000		

Table 6 presents the results of my analysis. Column 1 represents the year. Column 2 is the assumed percentage of blacks for that year. Column 3 is the probability [expressed as a percentage] that a jury of 19 non-blacks could be selected at random for that year. Column 4 represents the probability [expressed as a percentage] that all juries formed from 1900 thru the year shown would be comprised entirely of non-blacks if selection had been made on a purely random basis.

Table 6

Probability Year's Grand Jury is Non-Black and Probability This and All Prior Juries Were Non-Black Based Upon the Assumption Jury Selection Was Random

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1900	.80	85.846338	85.846338192
1901	.80	85.846338	73.695937809
1902	.80	85.846338	63.265264006
1903	.80	85.846338	54.310912496
1904	.80	85.846338	46.623929616
1905	.80	85.846338	40.024936297
1906	.80	85.846338	34.359942174
1907	.80	85.846338	29.496752162
1908	.80	85.846338	25.321881616
1909	.80	85.846338	21.737908129
1910	.80	85.846338	18.661198128
1911	.80	85.846338	16.019955256
1912	.80	85.846338	13.752544967
1913	.80	85.846338	11.806056262
1914	.80	85.846338	10.135066986
1915	.80	85.846338	8.700583881
1916	.80	85.846338	7.469132663
1917	.80	85.846338	6.411976886
1918	.80	85.846338	5.504447362
1919	.80	85.846338	4.725366498

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1920	.80	85.846338	4.056554105
1921	.80	85.846338	3.482403156
1922	.80	85.846338	2.989515590
1923	.80	85.846338	2.566389664
1924	.80	85.846338	2.203151550
1925	.80	85.846338	1.891324931
1926	.80	85.846338	1.623633196
1927	.80	85.846338	1.393829645
1928	.80	85.846338	1.196551711
1929	.80	85.846338	1.027195828
1930	.80	85.846338	.881810005
1931	.80	85.846338	.757001599
1932	.80	85.846338	.649858153
1933	.80	85.846338	.557879427
1934	.80	85.846338	.478919060
1935	.80	85.846338	.411134476
1936	.80	85.846338	.352943893
1937	.80	85.846338	.302989408
1938	.80	85.846338	.260105312
1939	.80	85.846338	.223290885
1940	.80	85.846338	.191687049
1941	1.11	80.890062	.155055773
1942	1.42	76.205702	.118161340
1943	1.73	71.779127	.084815178
1944	2.04	67.596896	.057332428
1945	2.35	63.646234	.036489932
1946	2.66	59.914992	.021862940
1947	2.97	56.391626	.012328867
1948	3.18	54.117348	.006672056
1949	3.49	50.918314	.003397298

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1950	3.80	47.898992	.001627272
1951	3.90	46.961761	.000764195
1952	4.00	46.041920	.000351850
1953	4.10	45.139167	.000158822
1954	4.20	44.253201	.000070284
1955	4.30	43.383725	.000030492
1956	4.39	42.615055	.000012994
1957	4.48	41.859304	.000005439
1958	4.57	41.116258	.000002236
1959	4.65	40.466280	.000000905
1960	4.73	39.826045	.000000360
1961	4.73	39.826045	.000000144
1962	4.73	39.826045	.000000057

Table 7 presents the results of my analysis on the assumption that the proportion of blacks in Kings county was indicated by the census data for each year. Again, column 1 represents the year, column 2 is the assumed percentage of blacks for that year [one-half that indicated by the census data and used in the development of Table 6], column 3 is the probability [expressed as a percentage] that a jury of 19 non-blacks could be selected at random for that year and column 4 represents the probability [expressed as a percentage] that all juries formed from 1900 thru the year shown would be comprised entirely of non-blacks if selection had been made each year on a purely random basis.

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1900	.40	92.667497	92.667496867
1901	.40	92.667497	85.872649757
1902	.40	92.667497	79.576035023
1903	.40	92.667497	73.741119762
1904	.40	92.667497	68.334049846
1905	.40	92.667497	63.323453500
1906	.40	92.667497	58.680259289
1907	.40	92.667497	54.377527438
1908	.40	92.667497	50.390293535
1909	.40	92.667497	46.695423683
1910	.40	92.667497	43.271480279
1911	.40	92.667497	40.098597632
1912	.40	92.667497	37.158366704
1913	.40	92.667497	34.433728302
1914	.40	92.667497	31.908874095
1915	.40	92.667497	29.569154903
1916	.40	92.667497	27.400995693
1917	.40	92.667497	25.391816826
1918	.40	92.667497	23.529961061
1919	.40	92.667497	21.804625930
1920	.40	92.667497	20.205801050
1921	.40	92.667497	18.724210054
1922	.40	92.667497	17.351256766
1923	.40	92.667497	16.078975320
1924	.40	92.667497	14.899983951
1925	.40	92.667497	13.807442161
1926	.40	92.667497	12.795011032
1927	.40	92.667497	11.856816448
1928	.40	92.667497	10.987415010
1929	.40	92.667497	10.181762460

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1930	.40	92.667497	9.435184409
1931	.40	92.667497	8.743349217
1932	.40	92.667497	8.102242861
1933	.40	92.667497	7.508145650
1934	.40	92.667497	6.957610635
1935	.40	92.667497	6.447443617
1936	.40	92.667497	5.974684612
1937	.40	92.667497	5.538590676
1938	.40	92.667497	5.130619991
1939	.40	92.667497	4.754417119
1940	.40	92.667497	4.405799335
1941	.55	89.965520	3.963700279
1942	.71	87.338294	3.461828207
1943	.86	84.783865	2.935071761
1944	1.02	82.300323	2.415573550
1945	1.17	79.885810	1.929700489
1946	1.33	77.538508	1.496260975
1947	1.48	75.256650	1.126035882
1948	1.59	73.747179	.830419696
1949	1.74	71.571241	.594341684
1950	1.90	69.456220	.412807266
1951	1.95	68.786683	.283956426
1952	2.00	68.123262	.193440381
1953	2.05	67.465908	.130506310
1954	2.10	66.814566	.087197225
1955	2.15	66.169184	.057697692
1956	2.19	65.593393	.037845874
1957	2.24	64.022353	.024608278
1958	2.28	64.456023	.015861517
1959	2.32	63.956545	.010144478

Year [1]	Prob. Black [2]	%-Prob. Jury is Non-Black [3]	%-Prob. All Juries are Non-Black [4]
1960	2.36	63.460735	.006437761
1961	2.36	63.460735	.004085450
1962	2.36	63.460735	.002592657

The results of my analysis that there is almost no probability that all of the juries from 1900 thru 1962 could have been formed without any blacks. As shown in Table 6, the probability that all juries formed from 1900 thru 1962 would be all non-blacks is 57 out of 100,000 million, if all the jury selections had been made on a purely random basis. As shown in Table 7, the probability that all juries formed from 1900 thru 1962 would be all non-black is less than 3 out of 100,000 even if the census data overstated the proportion of blacks twofold each year.

Sincerely,

Donald W. Parkyn
Consulting Actuary

THE ORDER TO SHOW CAUSE ISSUED BY THE DISTRICT COURT ON JANUARY 31, 1979

ORIGINAL
Filed
Jan. 31, 1979

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

BOOKER T. HILLERY, JR., Petitioner,	)	
vs.	)	CIVIL NO. S-78-594
GEORGE SUMNER, Warden, Respondent.	)	

MEMORANDUM

Petitioner, an inmate of San Quentin State Prison, requests leave to proceed in forma pauperis with an application for a writ of habeas corpus. He seeks to challenge the constitutionality of hs confinement, resulting from his Kings County

Superior Court conviction for murder, see Cal. Penal Code §187, on the grounds that: (1) he was denied equal protection of the laws because black persons were systematically excluded from the grand jury which indicted him; and (2) he was convicted by the use of evidence obtained by an illegal search and seizure.[1/]

After reviewing and considering the application for a writ of habeas corpus and the accompanying documents and affidavit in

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1/ On July 26, 1978, petitioner filed an additional pleading by which he purports to raise further challenges to the composition of his juries. The claims presented in that pleading are vague and conclusionary and unsupported by specific factual allegations demonstrating any denial of his constitutional rights. They are, therefore, insufficient to support his request for federal habeas corpur relief. See, e.g., Brown v. Allen, 344 U.S. 443, 458 n.6 (1953); Boehme v. Maxwell, 423 F.2d 1056, 1958 (9th Cir. 1970); Dunn v California Department of Corrections, 401 F.2d 340, 342 (9th Cir. 1968).

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forma pauperis, this court has concluded that petitioner should be granted permission to proceed in forma pauperis with this action, that an order to show cause should be issued as to his claim that he was denied equal protection of the laws, and that his application for federal habeas relief must be dismissed as to his claim that he was convicted by the use of evidence obtained by an illegal search and seizure.

Petitioner, a black man, alleges that the grand jury which indicted him was chosen upon the selector's "feeling" for the "better type" of people to serve, and that although 8% to 15% of the population of Kings County was black in the year of his indictment, no black persons served on the grand jury which indicted him. He further alleges that no black persons had served on any Kings County grand jury since the formation of the county in 1983.

The Supreme Court has long recognized that systematic exclusion of blacks from grand juries solely because of their race denies black defendants in criminal cases equal protection of the laws, see Patton v. State of Mississippi, 332 U.S. 463, 465 (1947), and that a conviction based upon an indictment by a grand jury from which blacks have been discriminatorily excluded cannot stand, see Whitus v. State of Georgia, 385 U.S. 545, 549-50 (1967); Pierre v. State of Louisiana, 306 U.S. 354, 362 (1939).

Evidence showing that no blacks have served on grand juries over a significant period of time has been held by the Court to establish a prima facie case of purposeful discrimination. See Coleman v. Alabama, 389 U.S. 22, 23 (1967) (per curiam); Reece v. State of Georgia, 350 U.S. 85, 88 (1955); Hill v. State of Texas, 316 U.S. 400, 404 (1942). The Court has also recognized

that subjective grand jury selection procedures are susceptible to abuse and thus support a presumption of discrimination raised by the substantial underrepresentation of a particular group. See Castaneda v. Partida, ___ U.S. ____, 97 S. Ct. 1272, 1280 (1977); Turner v. Fouche, 396 U.S. 346, 360 (1970); see also Witcher v. Peyton, 405 F.2d 725, 726-27 (4th Cir. 1969); Quadra v. Superior Court of City and County of San Francisco, 378 F. Supp. 605, 615 (N.D. Cal. 1974).

Petitioner's allegations that his grand jury was chosen on the basis of the selector's "feeling" for the "better type" of people to serve demonstrates such susceptibility, and coupled with the alleged total exclusion of black persons from Kings County grand juries, is sufficient to establish a prima facie case of discrimination in the selection of his grand

jury.[2] This court will, therefore, issue an order to show cause on the issue of whether petitioner was denied equal protection of the laws because black persons were systematically excluded from the grand jury which indicted him.

Petitioner also claims that he was convicted on the basis of evidence obtained by an illegal search and seizure in violation of his Fourth Amendment rights. The Supreme Court has ruled that federal habeas corpus relief may not be granted on the ground that evidenceintroduced at trial was obtained in an unconstitutional search or seizure if the state has provided an opportunity for a full and fair hearing of the Fourth Amendment

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[2] A showing that disparities between the black population and the number of blacks on jury lists resulted in part from the use of subjective criteria (disqualifying persons for being "unintelligent" and not "upright") has been found sufficient to establish a prima facie case of discrimination. Turner v. Fouche, supra at 360.

claim. Stone v. Powell, 428 U.S. 465, 494 (1976). Petitioner has alleged no facts showing that he did not have an opportunity for a full and fair hearing on his Fourth Amendment claim in the state courts and, therefore, the court will dismiss petitioner's application for a writ of habeas corpus insofar as it challenges the constitutionality of his confinement on the ground that he was convicted by the use of illegally seized evidence.

IT IS THEREFORE ORDERED that petitioner's request for leave to proceed in forma pauperis with this action is hereby granted.

IT IS FURTHER ORDERED that the respondent above-named show cause by a return in writing on or before twenty days from the date hereof why a petition for a writ of habeas corpus should not be granted on the ground that petitioner was denied equal

protection of the laws due to the systematic exclusion of blacks from the grand jury which indicted him, which return shall be filed with the Clerk of this Court at the United States Courthouse, Sacramento, California, and that a copy of the petition and this Order be served upon the Attorney General of the State of California or his representative therein.

IT IS FURTHER ORDERED that petitioner's application for a writ of habeas corpus is hereby dismissed insofar as it challenges the constitutionality of his confinement on the ground that he was convicted on the basis of evidence obtained in violation of his Fourth Amendment rights.

DATED: January 31st, 1979.

/s/T. J. Mac Bride